IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 521

DIANA KEARNY POWELL, *Petitioner*

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor Trustee; ANNE T. OGDEN and LESTER H. SELLERS, Executors of the Estate of Lucy Powell, deceased; ANNETTE I. POWELL, ADELE POWELL MARBUT, THELMA COX POWELL, ROBERT RANDOLPH POWELL, JR., MARY POWELL DAVIDSON, MARTHA POWELL NISTLER, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIANA KEARNY POWELL, *Attorney,*
Petitioner pro se
1500 Massachusetts Ave., N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

DIANA KEARNY POWELL, *Petitioner*

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor Trustee; ANNE T. OGDEN and LESTER H. SELLERS, Executors of the Estate of Lucy Powell, deceased; ANNETTE I. POWELL, ADELE POWELL MARBUT, THELMA COX POWELL, ROBERT RANDOLPH POWELL, JR., MARY POWELL DAVIDSON, MARTHA POWELL NISTLER, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on July 31, 1961.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is unreported. (Pet. 1a-2a). The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 4a-10a) is unofficially reported at 89 W.L.R. 1323 (Sept. 13, 1961). It has not been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit (Pet. 4a) was entered on July 31, 1961. Motion for rehearing by the Court en banc filed August 11, 1961 was denied by order entered September 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does a United States District Court interpreting an unambiguous residuary clause of a will in conflict with its plain meaning and in conflict with pertinent rules of law, act in so arbitrary and capricious a manner as to deprive the remainderman under the will of vested property rights without due process of law in violation of the Fifth Amendment of the Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. C. Constitution of the United States, Amendment 5:

No person shall be . . . nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

District of Columbia Code, Title 45, § 45-812—Vested and Contingent Future Estates.

A future estate is vested when there is a person in being who would have an immediate right to the possession of the land upon the expiration of the intermediate or precedent estate, or upon the arrival of a certain period or event when it is to commence in possession. It is contingent when the person to whom or the event upon which it is limited to take effect in possession or become a vested estate is uncertain. (Mar. 3, 1901, 31 Stat. 1351, ch. 854 § 1022).

STATEMENT OF THE CASE

Lucy Powell, the last of two life beneficiaries and last of five children named remaindermen by testatrix in her will, died September 1, 1958, and no child or descendant of a deceased child of testatrix except the petitioner herein, a granddaughter, was surviving at that date. (R.JA 25). The will provided that upon termination of the life estate by the marriage or death of both daughters (the two life beneficiaries), the entire property was *then* to be divided equally among five children of testatrix named in the will, the descendants of a deceased child to take the share of the parent, and specifically restating her intention that the entire property was to go to her children and their descendants. (R.JA 9-10). A report of the auditor on the third account of the successor trustee, filed March 31, 1959 (R.JA 14-17) showing distribution of one-third of the personal assets of the principal to petitioner and retention of two-thirds pending endeavor to locate Owen Bullitt Powell and George Cuthburt Powell, or their issue, if any, was approved by Order of the District Court, April 15, 1959 (R.JA 17-18). These two missing remaindermen were later found to have died in 1936 and 1943 respectively, neither one leaving surviving issue.

Petitioner Diana Kearny Powell, substituted remainder-men in the rights of her father, William Glasgow Powell, who died May 11, 1955, moved for distribution to her of the entire estate (R.JA 18-25) on August 31, 1959. Over petitioner's objections, motions filed by the Successor Trustee, and by the executors of the will of Lucy Powell who had not been substituted to their decedent or been made parties, were granted adding some twenty persons, including the above-described executors, none of whom were related to testratrix, as parties entitled to share in the estate, the estate of Lucy Powell claiming a major share. Ruling of the District Court (Pet. 1a-3a) and Order pursuant thereto (Pet. 3a-4a) authorized distribution of four-fifths of the estate to these new claimants, citing *Pyne* v. *Pyne,* 81 U.S. App. D.C. 11, 154 F. 2d 297 (D.C. Cir. 1946) as precedent that each of the five children named by testratrix in her will took a vested remainder which could be divested only if the child died prior to the death of the life tenants *with* issue surviving, the remainders of those dying *without* issue going to their respective estates. (Pet. 2a-3a).

A cross-claim for fraud by petitioner against the executors of the estate of Lucy Powell was summarily dismissed on December 21, 1960, on motion of the cross-claim-defendants on the ground that petitioner was without status to make the claim. This proceeding has not been made a part of the record on this appeal except by reference.

Appeal of right was duly taken, October 13, 1960, from the judgment of the District Court of September 20, 1960 (Pet. 1a-3a), and was argued February 20, 1961. Judgment of the District Court was affirmed in a two to one decision entered July 31, 1961 (Pet. 4a-

10a), on the premise that each of the five children of testatrix took a "vested remainder in fee" in one-fifth of the trust estate which passed to their respective estates on their death prior to termination of the preceding particular estate without surviving issue, and subject to be divested only if they predeceased the life tenants and were survived by issue. (Pet. 6a).

The dissenting opinion by Judge Prettyman, who also rendered the decision in *Pyne* v. *Pyne* (*supra*), cited as authority by all parties, cites the Pyne case as supporting petitioner's position that since testratrix clearly stated that her property was to remain with her own descendants, her clear intention should be respected.

Federal District Court had original jurisdiction of this case. The constitutional question was not previously specified, but is implied from the merits of the case and the proceedings.

ARGUMENT

Petitioner has a vested right in the whole residuary estate of her grandmother which is protected by the due process clause of the Fifth Amendment of the Constitution of the United States. That right has been violated by the ruling of the District Court authorizing four-fifths of the estate to be diverted to claimants not having such right, in conflict with well settled rules of law.

Petitioner, only granddaughter and living descendant of her grandmother, claims a vested right in the whole residuary estate of her grandmother under the clause of her grandmother's will set forth verbatim in the opinion of the court below (Pet. 5a).

Petitioner's father, William Glasgow Powell, trustee and remainderman under the will, died May 11,

1955. Lucy Powell, surviving life beneficiary, brought an action for appointment of the National Savings and Trust Company as successor trustee, naming petitioner, Owen Bullitt Powell, and George Cuthbert Powell as defendants. On the death of Lucy Powell, September 1, 1958, under the terms of the will as well as the rules of the Common law, the future estate vested absolutely and in fee in the remaindermen, ascertained and in being on that date. Owen, Cuthbert and Aimee named in the will all predeceased Lucy, and none had surviving issue, so that petitioner was the only remainderman having a vested future interest at termination of the trust. (R.JA 25).

It is well-settled law that there must be a person ascertained and in being for an interest to vest. The vesting of future interests is defined by statute in the District of Columbia, *District of Columbia Code,* Title 45, § 45-812 (Pet. 2). This conforms with the common law prohibition of abeyance of the seisin. Local decisions sustain this view. *Keep* v. *District of Columbia,* 181 F. 2d 789, 86 U.S. App. D.C. 206 (C.A.D.C. 1950) holds that vested remainders are subject to be divested should the remainderman, or any of them, fail to survive the life estate. *Pyne* v. *Pyne,* 81 U.S. App. D.C. 11, 154 F. 2d 297 (D.C. Cir. 1946) holds that the deceased remainderman is divested of his interest in favor of the substituted remainderman, and could not convey by will an interest which he did not have. *Jewell* v. *Graham,* 57 App. D.C. 391, 24 F. 2d 257, cer. den. 49 S. Ct. 559, 277 U.S. 596, 72 L. ed. 1006 holds similarly.

In the case here under consideration, the dissenting opinion cites the basic rule of construction that the intent of the testator controls, an intent plainly stated (Pet. 5a-9a) that the division of the property was to

take effect upon termination of the life estate among the remaindermen *then* in being. This is a gift to a class, not to individuals, and meets all the qualifications for such a grant.

The decision sought to be reviewed and the ruling of the District Court which it affirms, based upon the arguments of counsel for the Successor Trustee and of the Estate of Lucy Powell, claim in effect that an estate in fee was created in each of the five children of testatrix at the time of death of testatrix, or even at the time of drafting the will. Such a construction is self-contradicting and produces a ridiculous result in attempting to circumvent the provision of the District Code (Pet. 2) providing that a future estate is contingent when the person to take is uncertain.

The transcript of the ruling of the District Court and its self-contradiction, in conflict with earlier rulings by the same court on the same facts, and in conflict with established principles of law needs no comment. We submit that it is patently arbitrary and capricious.

The inviolability of vested rights delineated by Chief Justice Marshall in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629, are of equal force under the Fifth Amendment as under the contract clause of the Constitution. In a closely parallel case, *Ochoa* v. *Hernandez*, 250 U.S. 139, at 161, 57 L. ed. 1427, 33 S. Ct. 1033, this court ruled:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist in the sense in which it is known to our laws. The principal, known to the common law before Magna Charta, was embodied in that charta (Coke 2, Inst. 45, 50), and has been recognized since the Revolu-

tion as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure."

CONCLUSION

It is submitted that the important constitutional question of vested rights and the danger of a capricious decision becoming a precedent warrants review by this Court.

DIANA KEARNY POWELL, *pro se*
Attorney at Law
1500 Massachusetts Ave., N. W.
Washington 5, D. C.